No. 87-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC,

Petitioner,

v

AMERADA HESS SHIPPING CORPORATION AND UNITED CARRIERS, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1.Whether a court of the United States is competent under international law to entertain a suit against a foreign state for conduct that took place wholly outside the territory of the United States.

2.Whether the Foreign Sovereign Immunities Act of 1976 (FSIA) is the exclusive jurisdictional basis for suits against foreign states in the courts of the United States, or whether a suit against a foreign state may also be heard under the Alien Tort Statute of 1789 which empowers district courts to hear "any civil action by an alien for tort only, committed in violation of the law of nations."

3.Whether a court of the United States has personal jurisdiction to hear a claim by an alien against a foreign state for a tort alleged to have been committed by its armed forces on the high seas in violation of international law.

The caption of the case in this Court contains the names of all parties.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1a-21a) is reported at 830 F.2d 421 (1987). The opinion of the United States District Court for the Southern District of New York (Pet.App. 25a-35a) is reported at 638 F.Supp. 73 (1986).

JURISDICTION

The judgment of the court of appeals was entered September 11, 1987 (Pet.App. 22a). The petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied on November 18, 1987 (Pet.App. 24a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States of America provides in pertinent part:

> No person shall be . . . deprived of . . . liberty, or property, without due process of law; . . .

2. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1332 (a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982), reads in relevant part as follows:

> **§ 1330. Actions against foreign states**
>
> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has not been made under section 1608 of this title.
>
> • • • • •
>
> **§ 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

> **§ 1605. General exceptions to the jurisdictional immunity of a foreign state.**
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> • • • • •
>
> (5) not otherwise encompassed in paragraphs (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

3. The Alien Tort Statute of 1789, 28 U.S.C. § 1350, (1982) reads as follows:

> **§ 1350. Alien's action for tort**
>
> The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

A. THE ALLEGATIONS OF THE COMPLAINTS

Respondents United Carriers, Inc. ("United Carriers") and Amerada Hess Shipping Corporation ("Amerada Hess"), two Liberian corporations (J.A. 19, 28), sued the petitioner in the district court for an alleged tort committed in violation of the law of nations on the high seas. Respondents' claimed that during the Falkland Islands/Malvinas armed conflict between Argentina and the United Kingdom in 1982, Argentine military aircraft attacked and caused the loss in the South Atlantic of a vessel owned and chartered, respectively, by the respondents (J.A. 23,25, 29-30).

United Carriers' complaint alleged that it was the owner of the Liberian-registry tanker, the HERCULES (J.A. 28); that the vessel was engaged in carrying crude oil from Alaska, via the Cape Horn, to a refinery in the Virgin Islands (J.A. 28-29); that on June 8, 1982, while on a return voyage under ballast from the Virgin Islands to Alaska, the HERCULES was attacked and bombed in the South Atlantic by aircraft of the Argentine armed forces (J.A. 29); that as a result of these attacks the vessel suffered damages and was diverted to the port of Rio de Janeiro where it was determined that an undetonated bomb was lodged in one of the vessel's tanks (J.A. 29-30); that some six weeks later United Carriers decided to sink the vessel to avoid the risks inherent in an attempt to remove the undetonated bomb (J.A. 30); and that the vessel was scuttled in the Atlantic on July 20, 1982, some 250 miles off the coast of Brazil (*ibid.*). United Carriers claimed damages for the loss of the vessel in the amount of $10 million (*ibid.*) It sought to vest jurisdiction in the district court exclusively under the Alien Tort Statute, 28 U.S.C. § 1350 (J.A. 28).

The factual allegations in Amerada Hess' complaint concerning the loss of the HERCULES paralleled those in

United Carriers' complaint (J.A. 19-27). Amerada Hess asserted that it had time-chartered the HERCULES from United Carriers (J.A. 20) and that at the time the HERCULES was scuttled it carried bunkers owned by Amerada Hess valued at some $1.9 million, for which amount it claimed damages (J.A. 25, 26). Amerada Hess sought to vest jurisdiction in the district court on three separate bases: the Alien Tort Statute, general admiralty and maritime jurisdiction, and universal jurisdiction for violations of international law.[1] (J.A. 19-20).

B. THE RULINGS OF THE COURTS BELOW

Petitioner moved to dismiss both suits under Rule 12(b), F.R.Civ.P., for lack of subject matter and personal jurisdiction (J.A. 31, 33), and the district court dismissed the suits for lack of subject matter jurisdiction (Pet.App. 25a-35a). As with any motion to dismiss, the district court accepted the well-pleaded factual allegations of the complaints as true. In filing its jurisdictional challenges, petitioner did not, of course, concede the truth of the facts as alleged in the complaints.

The district court held that the FSIA was the exclusive source of jurisdiction in suits against foreign states. Pointing to § 1604 of the FSIA, the district court ruled that "[a] foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case," (Pet.App. 29a). The court found that none of the statutory exceptions to sovereign immunity from suit applied (Pet.App. 30a), and that the petitioner was therefore immune from suit under the ex-

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[1] In their statutory notices of suit, both respondents expressly disclaimed reliance on the FSIA as a jurisdictional predicate for their suits (Pet. App. 28a, 31a), although they caused service of their complaints to be made on the petitioner in conformity with the service provisions of 1608(a)(3) of the FSIA, *viz.*, by mailing the summonses, complaints and the statutory notices of suit to petitioner's Minister of Foreign Affairs in Argentina (*ibid.*).

press provisions of that Act. The district court did not separately address the question of personal jurisdiction.

The court considered at length, and rejected, respondents' contention that the Alien Tort Statute provided an independent source of jurisdiction for suits against foreign states when the aggrieved party is an alien (Pet.App. 31a-35a). It further rejected respondents' argument that Congress, in passing the FSIA, intended to preserve those provisions of the First Judiciary Act, which, according to respondents', were intended to permit aliens to assert claims against foreign sovereigns for violations of international law. The district court concluded (Pet.App. 31a):

> Both the premises and the conclusion of this inventive argument must be rejected. First, we do not credit plaintiff's contention that the Argentine Republic would not have enjoyed foreign sovereign immunity in an action such as this in 1789. Second, even if we accept plaintiff's version of legal history, the language of the Alien Tort Act is silent as to foreign sovereign immunity. Therefore, the FSIA does not repeal the Alien Tort Act any more than it repeals any other jurisdictional act that by its terms may include actions brought against foreign sovereigns.

The district court also rejected Amerada Hess' alternative contention that the district court should hear its civil claim against petitioner based on the "principle of universal jurisdiction," holding that doctrine only provides for criminal jurisdiction (Pet.App. 35a).

On appeal, a divided panel of the court of appeals reversed (Pet.App. 1a-17a). The majority (Feinberg, C.J., and Oakes, J.) held that the FSIA did not preempt the jurisdictional grant of the Alien Tort Statute and that the district court was competent to hear respondents' claims under that Act (Pet.App. 10a). In the majority's view, it

was irrelevant that a court faced with the circumstances of this case when the First Judiciary Act was enacted in 1789 would not have exercised jurisdiction over a foreign sovereign (Pet.App. 8a). Since in the majority's view the Alien Tort Statute contained a jurisdictional grant based on the "evolving standards of international law" (Pet.App. 9a), and since "attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law" under existing international standards (Pet.App. 7a), respondents could invoke the jurisdiction of a United States court under that Statute to obtain redress against the offending foreign state.

Turning to the jurisdictional provisions codified in the FSIA for suits against foreign states, the majority acknowledged that its Circuit had earlier ruled that "the [FSIA] insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act," *O'Connell Machinery Co.* v. *M.V. "Americana"*, 734 F.2d 115, *cert.denied*, 496 U.S. 1086 (1984), and that this Court had "expressed similar views" in *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) (Pet.App. 11a). Stating that "the view of the FSIA as the sole basis for United States jurisdiction over foreign sovereigns can be traced to the statute's legislative history" (*ibid.*), the majority undertook what it called "a close examination" of the legislative history of the FSIA and concluded that in enacting the FSIA "Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here" (*ibid.*). In the majority's view, the focus of the FSIA was principally on "commercial concerns" (Pet.App. 12a), and international law violations outside the commercial context—such as confiscations—"were not the focus of the 'comprehensive' language of the drafters of the FSIA any more than they were the focus of the Supreme Court in the *Verlinden* case" (*ibid.*). The majority concluded that—

> Thus, although Congress did not focus on suits for violations of international law, it clearly expected courts to apply the international law of sovereign immunity. As we have seen, under international law, Argentina would not be granted sovereign immunity in this case. Therefore, a grant of immunity here would fly in the face of this central premise. Since Congress did not express a clear intent to contradict the immunity rules of international law, and, indeed, left the Alien Tort Statute in force, we conclude that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.

(Pet.App. 13a).

The majority then addressed the question of personal jurisdiction over the petitioner, recognizing that "even given the jurisdictional grant of the Alien Tort Statute, the district court must have constitutionally satisfactory personal jurisdiction over the defendant" (Pet.App. 14a). The majority concluded that petitioner's actions, as alleged, had a sufficient nexus with the United States so that the exercise of personal jurisdiction would not offend notions of fair play and substantial justice as mandated by the Due Process Clause. In its view, the following factors were of jurisdictional significance (Pet.App. 14a-15a):

> — Argentina was on notice that it might be sued here;
>
> — The United States had notified Argentina that the HERCULES would be passing through the South Atlantic on neutral business;
>
> — The vessel was plying the United States domestic trade;
>
> — Argentina was aware of the United States' interest in protecting the freedom of the high seas;

> — Argentina has the means to defend a suit in the United States;
>
> — If the United States were to decline jurisdiction, substantive policies of international law would be undermined; and
>
> — Fairness favors the exercise of jurisdiction, since the respondents claimed that they were unable to obtain a remedy in Argentina.

In light of these factors, the majority concluded that there is "no constitutional bar to the district court's exercise of personal jurisdiction over Argentina here" (Pet.App. 15a). In consequence, the court of appeals reversed the dismissals in the district court and remanded the cases for further proceedings (Pet.App. 17a).

In her dissent (Pet.App. 18a-21a), Judge Kearse expressed skepticism at the notion that, in enacting the Alien Tort Statute, the First Congress intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of "evolving standards of international law," in light of the settled rule that federal court subject-matter jurisdiction is not a matter of common law (Pet.App. 19a).

But in any event, Congress had comprehensively covered the field of foreign sovereign immunity when it enacted the FSIA in 1976. In Judge Kearse's view, the express provisions of the FSIA and its legislative history made it abundantly clear that—

> (1) the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity, and (2) within that framework, recognition of such immunity is to be the rule, subject only to such exceptions as are expressly provided in the statute. Since the FSIA does not set forth any exception denying immunity in a case such as the present one, I would affirm the

judgment of the district court dismissing this action.

(Pet.App. 21a).

The court of appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc (Pet.App. 24a). This Court granted petitioner's petition for a writ of certiorari on April 18, 1988.

SUMMARY OF ARGUMENT

I. The gravamen of respondents' complaints is that while petitioner's armed forces were engaged in hostilities in the South Atlantic in the spring of 1982 during the Malvinas/Falkland Islands war, petitioner's warplanes attacked and damaged respondents' vessel, and that the damages ultimately caused the respondents to scuttle the vessel. Respondents claimed, and the court of appeals agreed, that the unprovoked attack on a neutral vessel on the high seas constituted a violation of international law for which a tort action will lie in a United States court.

Under international law generally, a state lacks legislative jurisdiction (or "jurisdiction to precribe") over conduct outside its territory by persons who are not its nationals and where the conduct causes no effect in the forum state. This principle applies with *a fortiori* force to the activities of military forces of a foreign power. Hence, United States courts are not competent to review the legality of the sovereign or public acts of a foreign state where, as here, such acts took place wholly outside the territory of the United States, have no affiliating link with the United States, and draw into issue the military activities of a foreign state.

II. A. The court of appeals erred in seeking to assert jurisdiction over the petitioner under the 1789 Alien Tort Statute, 28 U.S.C. § 1350, for violations of international law claimed to have been committed by petitioner's armed

forces on the high seas. The Foreign Sovereign Immunities Act of 1976 ("FSIA") "govern[s] all actions against foreign sovereigns," *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 491 n. 16 (1983), to the exclusion of any other federal or state law, including the Alien Tort Statute. Section 1604 of the FSIA provides in clear and unambiguous language that a foreign state is immune from the jurisdiction of federal and state courts, subject to a set of exceptions specified in §§ 1605 and 1607 and express jurisdictional provisions in treaties to which the United States is a party.

The FSIA incorporates the so-called "restrictive" doctrine sovereign immunity which permits the maintenance of suits against foreign states for their commercial and private law activities having a nexus with the forum state, but exempts foreign states from the jurisdiction of domestic courts for their public or sovereign activities. The actions of petitioner's armed forces, even if claimed to be in violation of international law, are unquestionably sovereign or public acts for which the petitioner is immune from suit in the courts of the United States under the restrictive doctrine of sovereign immunity.

B. In adopting the restrictive doctrine of sovereign immunity as part of federal law, Congress instructed the courts to interpret and apply the doctrine consistently with international law. The uniform practice of states—as evidenced by recent international codification in Europe, the works of the United Nations' International Law Commission and of the International Law Association, as well as national legislation enacted in the last decade in Australia, Canada, Pakistan, Singapore, South Africa and in the United Kingdom—is to exempt foreign states from the jurisdiction of national courts for acts performed by them in the exercise of public or sovereign powers. The court of appeals plainly erred in its holding that, in enacting the FSIA, Congress did not focus on violations of international law by foreign states and that the FSIA was principally

concerned with the commercial activities of foreign states. The language of § 1604 of the FSIA and its legislative history make it clear beyond peradventure that Congress did not vest United States courts with jurisdiction to sit as international claims courts to adjudicate claims against foreign states for alleged violations of international law.

III. The court of appeals' holding that the Alien Tort Statute provided a jurisdictional basis for suits by aliens against foreign states for alleged violations of international law is without support. To begin with, there is not a glimmer of a hint that that Statute was intended to provide an *in personam* remedy against foreign sovereigns when it was enacted by the First Congress in the late-eighteenth century.

The court of appeals erred in construing the Alien Tort Statute as a standing mandate to the lower federal courts to fashion novel jurisdictional bases for suits against foreign states based on what it deemed to be "evolving standards of international law." Only twelve years ago, in enacting the FSIA, Congress comprehensively regulated the jurisdiction of federal courts in suits against foreign states and incorporated in the Act what it regarded as the current standards of international law on the subject. Congress did not confer upon federal courts authority to fashion their own jurisdictional standards; rather, it made it abundantly clear that the FSIA standards preempted all other federal and state statutes in regard to the suability of foreign states. It is therefore the FSIA standards that the court of appeals should have followed h re; had it done so, it would have had no choice but to affirm the dismissal of these suits by the district court.

IV. A. There is no basis on which personal jurisdiction could be asserted against the petitioner by a federal court consistently with the Due Process Clause of the Fifth Amendment. In enacting the FSIA, Congress expressly incorporated the due process principles enunciated by this

Court in *International Shoe Company* v. *Washington*, 326 U.S. 310 (1945), and its progeny. The itemization in the FSIA of non-immune transactions is a prescription of the necessary substantial contacts which foreign states must have with the United States before federal or state courts can exercise personal jurisdiction over them.

Here the record is barren of any affiliating contacts between the petitioner and the United States which would authorize the assertion of personal jurisdiction over it. The alleged tort in violation of international law occurred on the high seas, off the coast of Brazil; the damage was suffered by a Liberian-flag vessel that was, respectively, owned and time-chartered by the respondents, two alien corporations. None of the activities of the petitioner's armed forces which are the subject of the complaint had any connection with the United States, its territory, or its nationals. There is no suggestion that in connection with the activities complained of petitioner purposefully established any contacts, however minimal or tenuous, with the United States.

None of the supposedly affiliating contacts between the petitioner and the United States catalogued by the court of appeals satisfy the due process requirements for personal jurisdiction: that petitioner was notified by the United States that respondents' vessel would be passing through the South Atlantic on neutral business; that the vessel was engaged in the transportation of crude oil from Alaska to the U.S. Virgin Islands; that petitioner was aware of the United States' interest in protecting the freedom of the high seas; that petitioner has ready means to defend the suit here; that substantive policies of international law would be undermined if suit were not maintained in the United States; that the charter party between the respondents called for payment in the United States; and finally, that respondents did not obtain a judicial remedy in the courts of Argentina.

None of these factors, in isolation or jointly, constitutes conduct by the petitioner in, or minimum connection with, the United States which would permit an assertion of personal jurisdiction over the petitioner consistent with the Fifth Amendment's Due Process Clause.

B. Petitioner was also not amenable to service and was therefore not subject to the court's personal jurisdiction on this independent ground. *Omni Capital Int'l* v. *Rudolf Wolff & Co.*, 484 U.S. ___, 98 L.Ed.2d 415, 424 (1987). Although expressly disclaiming that they were invoking the jurisdiction of the district court under the FSIA, respondents served petitioner under the service provisions built into the FSIA. That service provision, however, cannot be carried beyond what Congress intended. Since respondents relied on the Alien Tort Statute as a jurisdictional predicate for their suits, and since that statute has no built-in service provision, respondents could have effected valid service only under the long-arm statute of New York, CPLR § 302. That statute, however, was unavailable for extraterritorial service because of the total lack of contacts between the tort alleged and the state of New York.

ARGUMENT

I. UNITED STATES COURTS LACK COMPETENCE UNDER INTERNATIONAL LAW TO HEAR A CLAIM AGAINST A FOREIGN STATE FOR CONDUCT THAT TOOK PLACE WHOLLY OUTSIDE THE TERRITORY OF THE UNITED STATES

It is petitioner's basic submission that, regardless of the provisions of United States domestic legislation that are drawn into issue in this litigation, United States courts lack competence as a matter of international law to hear the claims asserted by the respondents. Although as shown below, the dispositive United States domestic legislation—the FSIA—is consistent with international custom and

usage in regard to the competence of municipal courts to adjudicate claims against foreign states, petitioner does not wish to be understood as placing sole reliance upon United States domestic law. As an independent sovereign state and a co-equal member of the community of nations with the United States of America, petitioner respectfully draws the Court's attention to the fundamental international law principle that denies competence to municipal courts to review the legality of the public acts of foreign states; this principle applies with *a fortiori* force where such acts take place wholly outside of the territory of the forum state and draw into issue military activities of a foreign state that are unquestionably public or sovereign acts of that state. Cf. *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950). This Court has from its earliest days recognized and applied as part of the municipal law of the United States established principles of public international law. *The Santissima Trinidad*, 7 Wheat. (20 U.S.) 283 (1822); *The Paquete Habana*, 175 U.S. 677 (1900), and it has repeatedly pronounced that domestic legislation must, wherever possible, be interpreted consistently with international law. *Murray* v. *The Charming Betsy*, 2 Cranch (6 U.S.) 64, 116 (1804); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953).

In petitioner's view, the existence of competence[2] precedes the question of jurisdictional immunity, since if a court is incompetent to hear a claim, issues of immunity from suit become redundant. Only if a court is competent to hear a claim will it be required (and authorized) to pronounce on the question of immunity. The court of appeals here committed at the very outset the fundamental error in declaring that the district court was competent to hear respondents' claims. Had the court focused on the material factual allegations of the complaint, it would have

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[2] The term "competence" is used in the sense in which this Court employed that term in *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 485 n. 5 (1983).

been compelled to conclude that the district court was right in dismissing the complaints for lack of competence. The gravamen of respondents' complaints here is that while petitioner's armed forces were engaged in hostilities in the South Atlantic in the spring of 1982, its war planes attacked and damaged on the high seas a neutral vessel flying the Liberian flag which was owned and time-chartered by the respondents—two neutral (Liberian) corporations. The damages suffered by the vessel are said to have caused the respondents ultimately to scuttle the vessel in the Atlantic off the Brazilian coast.[1]

Plainly, none of the activities complained of occurred within the territorial jurisdiction of United States courts; they occurred some 5,000 miles off the nearest shores of the United States. The respondents themselves have no links of nationality with the United States. No claim is made that persons or property enjoying the protection of United States laws were harmed.[2] The complaints simply seek to invoke the aid of a United States court to constitute itself as an international claims court and to compel the petitioner to justify the actions of its armed forces in this country.

This the courts of the United States are not competent to do. As a matter of international law, the United States has no legislative jurisdiction[4] to regulate the activities of

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[1] Indeed, in view of respondents' exclusive reliance on the Alien Tort Statute as a jurisdictional predicate, a claim that United States interests were involved would have been fatal to their jurisdictional thesis under that Statute.

[2] What the *Restatement (Third) of the Foreign Relations Law of the United States* § 401(a) (1988) ("*Restatement (Third)*.") now terms "jurisdiction to prescribe." § 402 of the Restatement defines the "Bases of Jurisdiction to Prescribe" as follows:

> Subject to § 403, a state has jurisdiction to prescribe law with respect to
>
> (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
>
> (b) the status of persons, or interests in things, present within its territory;
>
> (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
>
> (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
>
> (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

petitioner's armed forces abroad or on the high seas. Further, also as a matter of international law, the United States has no judicial jurisdiction[3] to review the lawfulness of petitioner's sovereign public acts abroad.

The court of appeals' jurisdictional ruling here has disregarded these fundamental concepts. No decision of this Court has ever sanctioned such an extraordinary assertion of legislative jurisdiction by the United States, or such a boundless extension of the judicial jurisdiction of United States courts. Moreover, no Act of Congress expressly or by implication authorizes United States courts to review sovereign or public acts of foreign sovereign states that have no nexus with the United States. Petitioner knows of no international usage of practice, foreign legislative act or decision by a foreign municipal court approving or favoring such an exorbitant reach of the competence of domestic courts.

Petitioner is confident that the United States Government would view with disquiet efforts by foreign municipal

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[3] Now termed "jurisdiction to adjudicate" and "jurisdiction to enforce" by the *Restatement (Third)*, § 401(b) and (c). § 421(1) states with respect to "Jurisdiction to Adjudicate" as follows:

> (1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or a thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.

courts to review the legality of the acts of the armed forces of the United States performed in the course of hostile operations. Petitioner respectfully submits that it, too, would have the most serious misgiving if the jurisdictional ruling below were to be upheld, and if claims or disputes which under the established practice of states have traditionally been made the subject of diplomatic espousal, international conciliation, or consensual arbitration or litigation in an international forum were to become the subject of litigation in the municipal courts of states, especially where the municipal courts have no connection with the parties and the matter in dispute. It is established international law that action by a state in prescribing or enforcing a rule that it does not have jurisdiction to prescribe or to enforce is a violation of international law, giving rise to the international responsibility of the state. *Restatement (Third)* § 403, comment *g*.).

Petitioner therefore urges that the jurisdictional ruling below be reversed in the first instance on the ground that it is violative of established principles of international law which have always been given effect by this Court.

II. THE COURT OF APPEALS ERRED IN RULING THAT THE FSIA IS NOT THE SOLE BASIS FOR FEDERAL COURT JURISDICTION TO HEAR CASES AGAINST FOREIGN STATES

A. THE FSIA PREEMPTS ALL OTHER FEDERAL LAWS GOVERNING THE SUABILITY OF FOREIGN STATES

Contrary to the court of appeals' holding, the FSIA is an all-encompassing statute which sets forth both the substantive and procedural standards that govern *all* suits that may be brought against foreign nations in state and federal courts in the United States. Although the statute provides that judicial, rather than executive, authorities should determine claims of foreign states to sovereign immunity from suit, it mandates that United States courts should "henceforth" decide claims of foreign states to immunity from suit "*in conformity with the principles set forth in this chapter*" (§ 1602, emphasis added). The principles prescribed by Congress in the FSIA embody the "restrictive" theory of sovereign immunity—*Verlinden B.V. v. Central Bank of Nigeria*, *supra*, 461 U.S. at 487—under which foreign nations are subject to suit only "insofar as their commercial activities are concerned" (§ 1602), *i.e.*, for activities *jure gestionis*. With one exception noted below, non-commercial, governmental or sovereign activities of foreign states—activities *jure imperii*—cannot be made the subject of suit in the courts of the United States as a matter of established international law which Congress expressly incorporated into the FSIA.

To achieve these goals, the FSIA broadly provides that federal district courts "shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state . . . as to any claim . . . with respect to which a foreign state is not entitled to immunity" under the terms of the statute or any applicable international agreement (§ 1330(a)). The FSIA announces detailed standards for determining when immunity is to be accorded. The fundamental principle on which the statute is structured is that foreign states are "*immune from the jurisdiction of the courts of the United States* and of the States" unless an exception is found within the statute or applicable international agreements (§ 1604, emphasis added). Statutory exceptions from this general grant of immunity exist when immunity has been waived (§ 1605(a)(1)), when the claim arises from specified commercial activities of the sovereign state (§ 1605(a)(2)), when rights in property *taken in violation of international law are at issue* (§ 1605(a)(3)), when rights in specified property situated in the United States are involved (§ 1605(a)(4)), and when claims based on tortious injuries to persons or property occurring within the United States are in question (§ 1605(a)(5)). Finally, the FSIA also denies sovereign immunity in certain admiralty proceedings based on spec-

ified commercial activities engaged in by vessels of the foreign state (§ 1605(b)).

In addition, the FSIA sets forth detailed procedural rules for suits against foreign states, including special rules governing venue (§ 1391(f)), jury trial (§ 1330(a)), service of process (§ 1608), answers to complaints (§ 1608), counterclaims (§ 1607) and default judgments (§ 1608(e)).

This comprehensive Congressional scheme makes it patent that the Act was intended to be the *sole* jurisdictional source for suits against foreign sovereigns.[6] Moreover, its legislative history makes it clear beyond peradventure that the statute was expressly "*intended to preempt any other state or Federal law* (excluding applicable international agreements) for according immunity to foreign sovereigns . . . ." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess., 12, *reprinted in* [1976] U.S. Code Cong. & Admin. News 6604, 6610 (1975) ("H.R. 94-1487") (emphasis added). The balance, completeness and structural integrity of the FSIA convincingly refutes the majority's conclusion that "Congress was not focusing on violations of international law when it enacted the FSIA" (Pet.App. 11a).

The majority expresses the view (Pet.App. 12a) that because the restrictive theory of sovereign immunity—and consequently the FSIA, which codified that theory—is concerned principally with the commercial activities of foreign

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[6] Since the enactment of the FSIA, six different panels of the Second Circuit have consistently held that in actions against foreign states the Act preempts all other jurisdictional statutes. *Progecfin de Venezuela* v. *Banco Industrial*, 760 F.2d 390, 392 (2d Cir. 1985); *Canadian Overseas* v. *Compania de Acero*, 727 F.2d 274, 277 (2d Cir. 1984); *O'Connell Machinery Co.* v. *M.V. "Americana,"* 734 F.2d 115, 116 (2d Cir. 1984), *cert.denied*, 469 U.S. 1086 (1984); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 307-09 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Ruggiero* v. *Compania Peruana de Vapores*, 639 F.2d 872, 873, 879 (2d Cir. 1981); *Carey* v. *National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979).

states, suits drawing into issue a foreign state's governmental acts are not embraced by the statute. This bizarre view wholly misconstrues the restrictive theory of immunity as it has developed in customary international law and as it was adopted by Congress in the FSIA.

As the name suggests, the restrictive theory distinguishes between "governmental" or "sovereign" activities engaged in by states (*jure imperii*) and their private law activities—activities of the kind that may also be carried on by private persons (*jure gestionis*) *Restatement (Third)* § 451. It is the essence of the restrictive theory to "restrict" or limit the jurisdictional immunity of foreign states to *all* acts of a *jure imperii* nature, and to deny immunity only for acts *jure gestionis*. The majority's focus on only that aspect of the restrictive theory which defines the circumstances under which states are not immune from suit and its total disregard of the other aspect of the theory which mandates immunity is plainly erroneous.

Section 1604 of the FSIA provides in language admitting of no ambiguity that *a foreign state is immune from jurisdiction of federal and state courts*, subject only to the set of exceptions specified in §§ 1605 and 1607, and express jurisdictional provisions in treaties or international agreements to which the United States is a party which may provide a different rule. *See also*, H.R. Rep.No. 94-1407, *supra*, at 17: "Section 1604 would be the *only* basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State Court in the United States" (emphasis added).

The court of appeals' construction of the FSIA is therefore plainly erroneous.

B. THE FSIA'S PROSCRIPTION OF SUITS DRAWING INTO ISSUE SOVEREIGN OR PUBLIC ACTS OF FOREIGN STATES IS CONSISTENT WITH RECENT INTERNATIONAL AND NATIONAL CODIFICATIONS OF THE DOCTRINE OF SOVEREIGN IMMUNITY

In passing the FSIA, Congress made it clear that it was the purpose of the legislation "to codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep. 94-1487, at 7. (See also *id.*, at 8: "Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state.") In addition, Congress instructed the courts to interpret and apply the Act consistently with international law. *Id.*. at 14.

A review of current international and national practice shows that no international organization or national legislative body has ever proposed to subject foreign states to the jurisdiction of national courts for extraterritorial acts performed in their sovereign or public capacity.

The passage of the FSIA has spurred much activity in the last decade on the international and municipal level to codify the law of sovereign immunity. Foremost among the international codification efforts has been the work of the United Nations' International Law Commission[7] and

[7] See, *Eighth Report on Jurisdictional Immunities of States and their Property* (Sompong Sucharitkul, Special Rapporteur), G.A. Doc. A/CN.4/396 (3 March 1986). In connection with the work of the I.L.C., the Legal Counsel of the United Nations circulated in 1979 a letter to Member States inviting them to submit relevant material on the topic of jurisdictional immunities, including national legislation, decisions of national tribunals and diplomatic and other correspondence. The responses of the Member States were published in *United Nations Legislative Series, Materials on Jurisdictional Immunities of States and their Property*, ST/LEG/SER.B/20 (1982) (hereafter "1982 U.N. Leg. Ser."), and may well contain the most comprehensive and authoritative compendium of materials collected on the topic.

of the Council of Europe. See European Convention on State Immunity and Additional Protocol of 1972, which came into force on June 11, 1976, when Austria, Belgium and Cyprus became the first three signatories to ratify the Convention and the Protocol.[8] Also noteworthy is the recent codification effort by the Organisation of American States, culminating in the Inter-American Draft Convention on Jurisdictional Immunity of States, approved by the Inter-American Juridical Committee on January 21, 1983 (*reprinted in* 22 Int. Leg. Mat. 292 (1983).)

Both the European Convention and the two international draft conventions begin with the basic premise that foreign states are absolutely immune from suit, and they then carve out certain exceptions to the general immunity. Thus, the European Convention provides in Article 15:

> A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear.

Unlike the FSIA, which in § 1605 seeks to define generically the non-immune acts of foreign states, the European Convention deals with specific situations. First, immunity is lost with respect to contracts which are to be performed in the forum state (Article 4.). However, immunity would not be lost if both parties to the contract are states, or if immunity is preserved in writing, or if the contract is a "*contract administratif*." Second, immunity is lost with

[8] Reprinted in 1982 U.N. Leg. Ser. at 156. As of January 1, 1988, Luxembourg, The Netherlands and Switzerland have ratified the Convention and Protocol, and the United Kingdom has ratified the Convention only. The Federal Republic of Germany and Portugal have signed but not ratified the Convention and Protocol. See Council of Europe, European Treaties, No. 74, Chart of Signatures and Ratifications (01/01/88).

respect to employment contracts where the work is to be done in the forum state (Article 5.) However, here too, immunity is preserved if the plaintiff is a national of an employing state and the action is brought in that state. Immunity is also preserved if the plaintiff is not a national of, or habitually resident in, the forum state at the time the contract was entered into. Third, there is no immunity when the state participates in a business organization with private persons and the plaintiff's claim relates to the activity of the organization (Article 6.). Finally, there is no immunity when the state sets up a commercial office in the forum state and the proceeding relates to the business of that office (Article 7.).

The I.L.C.'s draft Convention's general immunity rule is set forth in Article 6 as follows:

State Immunity

> A State is immune from the jurisdiction of another State in accordance with the provision of the present articles.
>
> Effect shall be given to State immunity in accordance with the provisions of the present articles.

This general rule is followed by specifically defined exceptions to immunity (Commercial contracts, Article 12; Contracts of employment, Article 13; Personal injuries and damage to property, Article 14; Ownership, possession and use of property, Article 15; Patents, trademarks and intellectual or industrial property, Article 16; Fiscal matters, Article 17; Participation in companies, Article 18; State-owned or State-operated ships engaged in commercial service, Article 19; Effect of arbitration agreement, Article 20.).

The Inter-American Draft Convention on Jurisdictional Immunity of States sets forth the general immunity provision in Article 1 as follows:

> A State is immune from the Jurisdiction of any other States.

Article 5 then provides the exceptions to the jurisdictional immunity in a general clause:

> States shall not invoke immunity against claims relative to trade or commercial activities undertaken in the State of the *forum* [,]

followed by a specification of six specific instances in Article 6 when immunity is not available.

As concerns national legislation, the United Kingdom State Immunity Act of 1978, c. 33,[9] which was in part enacted to implement the European Convention, follows closely the pattern of the Convention. It sets forth the general immunity rule as follows in Part I:

Immunity from jurisdiction

> 1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

The exceptions to immunity which are specified in Sections 2-13 follow the catalogue of non-immune acts listed in the European Convention.

The State Immunity Act of 1979 enacted by Singapore,[10] the State Immunity Ordinance of 1981 passed by Pakistan,[11] and the Foreign States Immunity Act of 1981 en-

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[9] Reprinted in 1982 U.N. Leg. Ser. *supra*, n.7, at 41.

[10] *Id.* at 28.

[11] *Id.*, at 20.

acted by South Africa[12] adopt almost verbatim the United Kingdom Act and follow its methodology of setting forth the general immunity provision, followed by detailed specifications of non-immune commercial or private law acts.

The Canadian State Immunity Act (1982)[13] follows the patterns of the FSIA; it sets forth the general immunity rule followed by a generic description of non-immune acts ("A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state" or "(a) any death or personal injury or (b) any damage to or loss of property that occurs in Canada." Sections 5 and 6 of the Canadian Act).

The latest national codification on the subject, the Australian Foreign State Immunities Act (1985),[14] again follows more closely the United Kingdom Act in that it specifies in detail the non-immune commercial acts of foreign states which can be litigated in Australia. Like all other national legislation, it starts out with the general rule "Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding." Section 9.

This cursory survey of recent international codification and municipal legislation belies the majority's assertion that under current international law foreign states are not immune from suit for violation of the law of nations.

It would be idle to cite any of the literally hundreds of recent decisions of national courts uniformly differentiating between sovereign or public acts and commercial acts of States, and denying immunity only in the latter category

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[12] *Id.*, at 34.

[13] 29-30-31 Elizabeth II, c. 95.

[14] No. 196 of 1985, *reprinted* in 25 Int. Leg. Mat. 715 (1986).

of cases.[15] Suffice it to say that the petitioner is unaware of a single instance where a municipal court has attempted to review in a private lawsuit the activities of a foreign state's armed forces in time of military conflict, where such activities had no nexus with the forum state.

C. THE LEGISLATIVE HISTORY OF THE FSIA CONFIRMS THAT THE ACT GOVERNS ALL ACTIONS AGAINST FOREIGN SOVEREIGNS

In *Verlinden B.V., supra*, this Court painstakingly reviewed the provisions of the FSIA and its legislative history and concluded that the statute "contains a comprehensive set of legal standards governing claims of immunity *in every civil action against a foreign state* . . ." (461 U.S. at 488, emphasis added). Elsewhere in *Verlinden*, the Court repeatedly emphasized that the FSIA was "clearly intended to govern *all actions* against foreign sovereigns" (461 U.S. at 491 n.16, emphasis added).[16]

The majority here is wholly oblivious to the findings and declaration of purpose by Congress in § 1602 of the FSIA. It has interpreted the FSIA in a manner which negates the Act's own stated purposes. This a court may not do.

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[15] The decisions of national courts interpreting and applying the restrictive doctrine of sovereign immunity are conveniently reprinted in 1982 U.N. Leg. Ser., *supra*, n.7 at 181 *ff.*

[16] Every Circuit that has addressed the issue agrees that the FSIA provides the exclusive basis for federal jurisdiction in civil actions against foreign states and their agencies. *See, City of Englewood* v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Williams* v. *Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Goar* v. *Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985); *Yugoexport, Inc.* v. *Thai Airways Intern. Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984), *cert. denied*, 471 U.S. 1101 (1985); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986); *MacArthur Area Citizens Association* v. *Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987).

New York State Dept. of Social Services v. *Dublino*, 413 U.S. 405, 420 (1973).

Judge Kearse, we submit, was correct in her dissent when she stated that "it is clear from both the statutory language and the legislative history that . . . the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity." (Pet.App. 21a). Her conclusion that federal courts are not vested with subject-matter jurisdiction in suits against foreign states under the Alien Tort Statute is unassailable.

We therefore submit that the majority below erred in misconstruing the nature of the restrictive theory of sovereign immunity as it has developed in international law, and has disregarded the express provisions of § 1604 of the FSIA, the statute's legislative history and this Court's binding precedent in *Verlinden*. Its holding that in enacting the FSIA Congress did not evidence a clear design "to eliminate the jurisdictional grant of the Alien Tort Statute for violations of international law"[17] (Pet.App. 12a)

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[17] The D.C. Circuit is the only appellate court which has addressed the question whether the FSIA preempts any arguable jurisdictional grant in the Alien Tort Statute for claims against foreign states. In *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), the court affirmed *per curiam*, with three separate concurring opinions, a dismissal of a suit against Libya and certain Arab organizations seeking damages for a terrorist attack in Israel. While the concurring opinions differed widely as to the construction of the Alien Tort Statute in suits against non-sovereign parties, two members of the panel expressly found that suit against the state of Libya was barred by reason of the exclusive jurisdictional grant contained in the FSIA. 726 F.2d at 776 n.1 (Edwards,J.) and at 805 n.13 (Bork,J.).

See also, In re Korean Air Lines Disaster of September 1, 1983, 597 F.Supp. 613 (D.D.C. 1984) (Alien Tort Statute does not confer competence on district courts in suits against a foreign state); *Siderman* v. *Republic of Argentina*, No. CV 82-1772-RMT (C.D.Cal., March 7, 1985), *appeal pending*, 9th Cir. No. 85-5773 (same); *contra*, *Von Dardel* v. *U.S.S.R.*, 623 F.Supp. 246 (D.D.C. 1985)(alternative holding).

is patently erroneous, and should be reversed by this Court.[18]

III. THE ALIEN TORT STATUTE DOES NOT PROVIDE A JURISDICTIONAL BASIS FOR SUITS AGAINST FOREIGN STATES

The court of appeals rested its jurisdictional ruling in this case squarely on the Alien Tort Statute, 28 U.S.C. § 1350 (Pet.App. 7a-10a). This was plain error.

As originally enacted in 1789, the Alien Tort Statute provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes

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[18] Argentina has, to date, not adopted the restrictive theory of immunity but accords to foreign states immunity on the basis of reciprocity.

The requirement of reciprocal treatment is codified in Article 2 of Law No. 21708, which amended Article 24 of the Law on the Organization of the National Courts, *Boletín Oficial*, December 28, 1977. The provision reads:

> No action shall be taken on a complaint against a foreign State without first seeking from its diplomatic representative, through the Ministry of Foreign Affairs and Worship, the consent of that country to submit to proceedings. However, the executive branch may declare, by means of a duly substantiated decree, with respect to a particular country, that there is no reciprocity for the purposes of this provision. In such cases, the foreign State with respect to which such a declaration has been made shall be subject to Argentine jurisdiction. If the declaration of the executive branch specifies that the absence of reciprocity applies only in certain respects, the foreign country shall be subject to Argentine jurisdiction only in those respects. The executive branch shall declare that reciprocity is established when the foreign country so amends its rules.

For applications of that provision, see *Oppenlander De Soska* v. *Embassy of Equador*, 65 Int.L.Rep. 2 (S.Ct. Argentina, 1951); *Townshend de Briochetto* v. *Office of the Department of Commerce of Canada*, 65 Int.L.Rep. 1 (S.Ct. Argentina, 1949).

where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." First Judiciary Act, ch. 20, § 9(b), 1 Stat. 73, 77.[19]

No legislative history on this provision has been uncovered. Charles Warren, in his historic article *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv.L.Rev. 49 (1923), barely mentions § 9(b) in passing. Following the Second Circuit's landmark decision in *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (1980), which permitted the maintenance of a damage action based on the Alien Tort Statute by a Paraguayan national against another Paraguayan then residing in New York for torture committed in Paraguay, there has been a spate of speculation

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[19] In the 1878 revision and codification of federal statutes, the Act was changed to provide that "the district courts shall have jurisdiction . . . [o]f all suits brought by any alien for tort only' in violation of the law of nations, or of a treaty of the United States." Rev.Stat. § 563. The deletion of the reference to the state courts' concurrent jurisdiction did not make the district courts' jurisdiction exclusive, because the plan of the Revised Statutes was to enact a single section consolidating all instances of exclusive federal jurisdiction. Rev.Stat. § 711.

In 1911, the Act was reenacted in the following terms: "The district courts shall have original jurisdiction . . . [o]f all suits brought by any alien for a tort only, in violation of the law of nations or of a treaty of the United States." Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093. The 1911 codification continued the consolidation of all instances of exclusive federal jurisdiction in one section. *Id.* § 256, 36 Stat. 1160-61.

The current language was enacted as part of the 1948 revision of the Judicial Code. The words "civil action" were substituted for "suits" in view of Rule 2 of the Federal Rules of Civil Procedure. H.R. Rep. No. 308, 80th Cong., 1st Sess., app. at 124 (1947) (reviser's notes). The 1948 revision repealed the former section listing all instances of exclusive jurisdiction, and instead made express provisions for exclusive jurisdiction in the individual sections vesting the federal courts with jurisdiction. *See*, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 418 (2d ed. 1973).

by courts[20] and legal scholars[21] as to the purpose and meaning of this statute.

Despite this recent focus on the history and meaning of the statute, it is fair to state that Judge Friendly's observation appears as valid today as it was when made over decade ago: "This old but little used section is a kind of legal Lohengrin . . . no one seems to know whence it came." *ITT* v. *Vencamp, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

Petitioner does not propose to settle in this brief the academic controversy as to the origin, purpose or meaning of the Alien Tort Statute, or to proffer yet another hypothesis as to what Oliver Ellsworth—the acknowledged author, whose hand-written draft of the Statute the respondents have included in the joint appendix herein, J.A. 112—may have intended.

The statute is plainly jurisdictional. It confers subject-matter jurisdiction on federal courts, concurrent with the courts of the states, in suits (1) by an alien, (2) for a tort only, (3) committed in violation of the law of nations or (4) a treaty of the United States. It says nothing about who the defendant in such a suit might be. It is silent on the substantive law that should govern a claim for relief asserted under the Statute.

It is remarkable that in its 180-year existence prior to the enactment of the FSIA, no court, legal scholar or

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[20] *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984), *cert.denied*, 470 U.S. 1003 (1985) (Edwards, J., 726 F.2d at 777-86; Bork, J., *id.* at 812-19). *Sanchez-Espinoza* v. *Reagan*, 770 F.2d 202, 206-07 (D.C.Cir. 1985).

[21] Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U.J. Int'l L. & Pol. 1 (1985); Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, *id.*, at 473; Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn.L.Rev. 467 (1986).

advocate ever contemplated the Alien Tort Statute as a potential jurisdictional basis for a personal suit against a foreign state.[22] It is even more remarkable that if the First Congress had contemplated § 9(b) of the Judiciary Act as a potential vehicle for suits against foreign sovereigns, the mere possibility of such an unprecedented judicial involvement in the relationship between this fledgling Republic and other sovereigns would have failed to elicit some recorded reaction from the members of the First Congress or in contemporary chronicles.

The court of appeals here did not, to be sure, fully adopt respondents' theory that the Alien Tort Statute was originally designed to confer competence on United States courts to hear personal claims against foreign sovereigns:

> As a preliminary matter, it may be—at least as to a loss of a vessel under the circumstances alleged here—that absolute sovereign immunity did not govern when the Alien Tort Statute was enacted. . . . We need not decide, however, whether a court faced with the circumstances of this case in 1789 . . . would have exercised jurisdiction over a foreign sovereign. In construing the Alien Tort Statute, "courts must interpret international law not as it was in 1789, but as

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[22] See the comprehensive catalogue of published opinions referring to the Alien Tort Statute between 1793-1980 in Prof. Randall's insightful paper, *supra*, n.21, 18 N.Y.U.J. Int'l L. & Pol. at 4, n. 15.

The only time this Court considered the Alien Tort Statute was in a suit brought by an alien against the American commanding general in Cuba following the Spanish-American war, claiming that a taking of her property by the U.S. occupation authorities had been in violation of the law of nations and a treaty of the United States. *O'Reilly de Camara* v. *Brooke*, 209 U.S. 45 (1908). The Court affirmed the dismissal of the suit on the ground that the acts of the American commander did not amount to a tort, since the Executive and Congress had ratified and adopted the commander's activities.

> it has evolved and exists among the nations of the world today."

(Pet. App. 8a-9a),citing *Filartiga* v. *Pena-Irala, supra*, 630 F.2d at 881.

Having said this, the court of appeals then shut its eyes to the accepted principles of international law governing the suability of foreign states as they have now developed—and as comprehensively codified by Congress in the Foreign Sovereign Immunities Act—and embarked upon developing a novel rule of competence of domestic courts to review the public acts of foreign states where violations of international law are alleged. It did so under the guise of interpreting the Alien Tort Statute, which it regarded as a continuing mandate by the First Congress to the lower federal courts to expand their competence as changed circumstances may, in the court's view, dictate. In other words, to engage in a process akin to the process which this Court engages in when it interprets and applies the Constitution of the United States.

The vice of this approach is that it disregards the settled rule that lower federal courts are courts of limited jurisdiction and may exercise jurisdiction only in such cases or controversies as is expressly conferred upon them by Congress. *Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 701 (1982); *Cary* v. *Curtis*, 3 How. (44 U.S.) 236, 245 (1845). As Judge Kearse aptly pointed out in her dissent, Congress has conferred no power upon the lower federal courts to fashion novel jurisdictional rules depending on the vicissitudes of "evolving standards of international law" (Pet.App. 19a). In addition, purporting to interpret the Alien Tort Statute in the light of modern developments, the court of appeals wholly ignored the current established rule of international law that jurisdiction to adjudicate depends on jurisdiction to prescribe, both in domestic cases and under international law. This was plain error. *See Restatement (Third)*, §§ 401, 421 (*supra*, n. 5);

see also Singer, *Abandoning Restrictive Sovereign Immunity: an Analysis in Terms of Jurisdiction to Prescribe*, 26 Harv.J.Int'l L. 1 (1985).

Finally, in its twisted interpretation of the Alien Tort Statute, the court of appeals also erred—as shown in Part II, *supra*—in assuming that in enacting the FSIA in 1976, Congress had neglected to address the jurisdiction of United States courts over of foreign states for potential violations of international law, and that therefore it was incumbent on the court of appeals to fill the interstice. In this context, Justice Frankfurter's remark is apposite: "[i]mportant shifts in jurisdiction ought to be the product of something more persuasive that what is made to appear as a fit of Congressional absentmindedness." *Williams* v. *Austrian*, 331 U.S. 642, 680 (1947) (Frankfurter, J., dissenting).

But more importantly, where, as it has done in the FSIA, Congress has only recently enacted a comprehensive legislative scheme defining the competence of domestic courts in suits against foreign states, including an integrated system of procedures for notification and enforcement, it is not for the courts to fashion new rules of competence under a two-centuries old statute that was never used as a jurisdictional basis for suits against foreign states prior to the enactment of the FSIA.

The court of appeals' reliance on the Alien Tort Statute in justifying the exercise of jurisdiction over the petitioner under the circumstances of this case is therefore ill-founded, and should be reversed by this Court.

IV. THE COURT OF APPEALS' ERRED IN HOLDING THAT PERSONAL JURISDICTION OVER THE PETITIONER MAY BE ASSERTED IN THIS CASE

In addition to lack of competence under the FSIA and under the Alien Tort Act, there is also no basis on which *in personam* jurisdiction could be asserted over the petitioner in this instance. There is a manifest lack of

petitioner's constitutionally-required minimum contacts with the forum and no legal provision for its amenability to service of process, both of which are prerequisites to a court's exercise of personal jurisdiction.

A. PETITIONER LACKS THE CONSTITUTIONALLY-MANDATED MINIMUM CONTACTS WITH THE FORUM AND THEREFORE IS NOT SUBJECT TO THE COURT'S IN PERSONAM JURISDICTION

Petitioner is beyond the court's jurisdictional reach because it does not have a "constitutionally sufficient relationship" with the forum. *Omni Capital Int'l* v. *Rudolf Wolff & Co.*, 484 U.S. ___, 98 L.Ed.2d 415, 424 (1987).

In addressing the issue of personal jurisdiction, the court of appeals began correctly by reciting the fundamental constitutional principle that "a non-resident defendant must have sufficient contacts with the forum" before a court in this country can lawfully hear a claim against it (Pet.App. 14a); but it then engaged in a sophistical analysis to reach the untenable conclusion that Argentina has the requisite substantial contacts with the United States.[23] This conclu-

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[23] Because of its disregard of the FSIA's provisions dealing with subject-matter jurisdiction, the majority also disregarded the Act's built-in provisions governing assertions of personal jurisdiction against foreign states. This court succinctly summarized the statutory scheme in *Verlinden*, *supra*, as follows:

> Under the Act, however, both statutory subject-matter jurisdiction (otherwise known as "competence") and personal jurisdiction turn on application of the substantive provisions of the Act. Under § 1330(a), federal district courts are provided subject-matter jurisdiction if a foreign state is "not entitled to immunity either under sections 1605-1607 . . . or under any applicable international agreement"; § 1330(b) provides personal jurisdiction wherever subject-matter jurisdiction exists under subsection (a) and service of process has been made under 28 U.S.C. § 1608. Thus, *if none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject-matter and personal ju-*

sion is palpably in conflict with the holdings of this Court, beginning with the seminal case of *International Shoe Company* v. *Washington*, 326 U.S. 310 (1945).[24]

The requirement that a court have *in personam* jurisdiction over a defendant before it can render a valid judgment personally binding on him "flows . . . from the Due Process Clause." *Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 (1982). This restriction on judicial power "recognizes and protects an individual liberty interest." *Id.* Consequently, it is settled constitutional doctrine that before a court may exercise personal jurisdiction over a nonresident defendant, it must be shown that the defendant has "certain minimum contacts" with the forum so that maintenance of the suit would not offend "traditional notions of fair play and substantial justice." *International Shoe Co., supra*, 326 U.S. at 316.

In *Hanson* v. *Denckla*, 357 U.S. 235 (1958), this Court made it explicit that it is *the defendant's*, not the plaintiff's, contacts with the forum which are pivotal to a due process analysis:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . [I]t is essential that in each case that there be some act by which the *defendant* purposefully avails itself of the privilege of con-

risdiction. [461 U.S. at 485 n.5, emphasis added.]

§ 1605's itemization of non-immune transactions is a prescription of "the necessary contacts which must exist before before our courts can exercise personal jurisdiction." H.R. Rep. No. 94-1487, *supra*, at 13.

[24] In enacting the FSIA, Congress expressly incorporated the due process principles enunciated in *International Shoe*. H.R.Rep. No. 94-1407, *supra*. Moreover, the Second Circuit has elsewhere expressly held that a foreign state may invoke the constitutional safeguards of the Due Process Clause. *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, *supra*, 647 F.2d at 313.

> ducting activities within the forum State, thus invoking the benefits and protections of its laws.

357 U.S. at 253 (emphasis added). The principle that only the defendant's contacts with the forum are relevant in a due process analysis was only recently reaffirmed by this Court in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 475 (1985):

> Jurisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.

(Emphasis in original); *see also Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. ___, 94 L.Ed.2d 92, 102 (1987).

In addition to the requirement that the contacts with the forum be those of the defendant's, the defendant must have "*purposefully* established [the] minimum contacts' in the forum State" before an exercise of personal jurisdiction can be found to comport with due process. *Asahi Metal Industry*, *supra*, 94 L.Ed.2d at 102. Consequently, a defendant's contacts may not merely be of a "random, fortuitous, or attenuated" character. *Burger King Corp.*, *supra*, 471 U.S. at 475. "The 'substantial connection' . . . between the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*" *Asahi Metal Industry Co.*, *supra*, 94 L.Ed.2d at 104, quoting *Burger King Corp.*, *supra.*, 471 U.S. at 475 (emphasis in original).

Whenever a defendant engages in such "purposeful" activities in a forum, the defendant is deemed to have foreseen the possibility of being sued there on matters arising out of those activities. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Consequently, if the defendant's "conduct and connection with the forum

are such that he should reasonably anticipate being haled into court there," he may be found to have the requisite minimum contacts with the forum. *Burger King Corp., supra.*, 471 U.S. at 474.

However, even though the defendant may have purposefully established minimum contacts with the forum, it is necessary to consider still other factors before concluding that an assertion of jurisdiction would accord with the constitutional limitations of due process. For as this Court declared in *Burger King Corp., supra*, 471 U.S. at 476-77—

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." *International Shoe Co.* v. *Washington*, [*supra.*, 326 U.S. at 320]. Thus courts in "appropriate case[s]" may evaluate "the burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies." *World-Wide Volkswagen Corp.* v. *Woodson*, [444 U.S. at 292].

Thus, "even if the defendant has purposefully engaged in forum activities," a court's exercise of personal jurisdiction over that defendant could still be deemed unreasonable and violative of due process. 471 U.S. at 477-78.

Here, the record is barren of any "substantial connection" or even of any minimum contacts between the petitioner and the United States in relation to the claims

asserted against it by the respondents. The alleged tort occurred on the high seas, off the coast of Brazil, resulting in damage to a Liberian-flag vessel that was owned and time-chartered by two Liberian corporations. The attack on the vessel occurred as a consequence of the Falkland Island/Malvinas conflict between the Argentine Republic and the United Kingdom. No activity of *petitioner's* took place in the United States in connection with this incident,[25] nor is there any basis on which to conclude that the petitioner "should [have] reasonably anticipate[d] being haled into court" in the United States for attacking this vessel in the South Atlantic. As this Court reemphasized only last term in *Asahi Metal Industry, supra*, 94 L.Ed.2d at 102,

> "[T]he constitutional touchstone" of the determination whether an exercise of personal jurisdiction comports with due process "remains whether the defendant purposefully established 'minimum contacts' in the forum State." [Citing *Burger King, supra*, 471 U.S. 462,474]

It is manifest that the petitioner did not in this instance purposefully establish such contacts, nor undertake any action "*purposefully directed toward*" the United States. *Asahi, supra*, 94 L.Ed.2d at 104 (emphasis in original).

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[25] Respondents' assertion (adopted in dictum by the court of appeals) that the high seas are to be considered waters subject to the jurisdiction of the United States and thus territory of the United States is not rational in the context of a non-U.S. flag vessel. However, even if the vessel involved had been U.S.-registered, "[s]uch an unprecedented assertion of jurisdiction against *foreign states* could interfere with the conduct of our foreign policy and impair relations between the United States and other governments." *McKeel* v. *Islamic Republic of Iran*, 722 F.2d 582, 589 (9th Cir. 1983) (emphasis in the original). "Moreover, under the principle of reciprocity . . . the United States could become subject to foreign jurisdiction" for incidents occurring on the high seas or other locations outside the United States. *Ibid.*

The court of appeals' conclusion to the contrary does not bear scrutiny:

First, in addressing the element of foreseeability, the court of appeals totally neglected to examine as a threshold matter the petitioner's "conduct and connection" in this instance with the United States, upon which any determination of foreseeability must be based. *Burger King Corp., supra.*, 471 U.S. at 474.

Second, the court's statement that the petitioner was "on notice that it might be sued here" (Pet.App. 15a) is devoid of legal or factual support. The facts relied upon that supposedly warranted a finding of such notice were that (i) the United States had notified petitioner that the HERCULES would be passing the South Atlantic on neutral business, (ii) the HERCULES was engaged in transporting Alaskan oil to the U.S. Virgin Islands, and (iii) petitioner was aware of the United States' interest in protecting the freedom of the high seas. Such facts manifestly do not establish that the *petitioner* engaged in any purposeful activities directed at the United States for which it could have reasonably anticipated being haled into court in this country.[26]

Third, notification by the United States of the HERCULES' presence in the South Atlantic was an act performed by the United States, not by the petitioner, and thus irrelevant in a due process analysis. The "unilateral

[26] Moreover, if one were to indulge in the assumption that petitioner was charged with knowledge of the intricacies of American Constitutional and domestic law, the only rational conclusion one could draw is that petitioner was on notice of the *International Shoe* doctrine. Petitioner would further be chargeable with notice that Congress, in enacting the FSIA, was aware of concerns that "our courts [not be] turned into small international courts of claims[.]' . . . open to all comers to litigate any dispute which any private party may have with a foreign states anywhere in the world." (Testimony of the Department of Justice's representative on the FSIA, quoted in *Verlinden B.V.* v. *Central Bank of Nigeria, supra*, 461 U.S. at 490).

activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 417 (1984).

Fourth, the circumstance, as characterized by the court of appeals, that the HERCULES "was plying the United States domestic trade" (Pet.App. 15a) and that *the vessel or its owner or charterer* had some relationship with the United States is of no moment to a due process analysis.[27] This does not establish a link *by the petitioner* with the United States.

Fifth, the fact that the HERCULES was transporting oil "pursuant to a contract that called for payment in the United States," (Pet.App. 15a) a fact which petitioner did not know and could not have conceivably known at the time of the incident, is wholly irrelevant. Petitioner was not a party to, nor affected by, the contract and cannot be deemed to have established any contact with the United States by reason of respondents' banking activities in this country. Moreover, any suggestion that personal jurisdiction exists here because the disruption of contractual payments in New York allegedly caused an injury in the United States would fail to pass due process scrutiny. It is well settled that injury or effect alone—while perhaps sufficient to satisfy a long-arm statute requirement—does not permit

[27] The circumstance that the HERCULES, a Liberian vessel, was "transporting oil from one part of the United States to another part of the United States" (Pet.App. 15a) is obviously of relevance to the enforcement of United States safety and environmental regulations against the *vessel; see, e.g.*, 33 C.F.R. § 157.03(2), Coast Guard regulations defining "domestic trade." Contrary to the majority's implication, this does not mean that a foreign-flag vessel in international waters heading for an American port is within the territory of the United States, or that nonresidents coming in contact with such a vessel on the high seas thereby establish a nexus with the United States for personal jurisdiction purposes.

a finding of minimum contacts. *See, e.g., Burger King Corp., supra*, 471 U.S. at 474.

Sixth, petitioner's awareness of the United States' interest in protecting the freedom of the high seas (Pet.App. 15a) hardly satisfies the *constitutional* requirement that the *acts of the petitioner* which are alleged to have caused injury to the respondents have certain minimum contacts with the United States.

Seventh, the fact that Argentina has generally "benefited from the freedom of the seas guaranteed by international law and the law of the United States" (Pet.App. 15a) does not constitute any purposeful availment by petitioner "of the privilege of conducting activities within the forum State," to support a finding that it has thereby invoked "the benefits and protections of [United States] law." *Hanson* v. *Denckla, supra*, 357 U.S. at 253. Any benefits accruing to the petitioner from such a "collateral relation to the [United States] will not support jurisdiction if they do not stem from a constitutionally cognizable contact with" the United States. *World-Wide Volkswagen Corp.* v. *Woodson, supra*, 444 U.S. at 299. No such contacts exist here.

Eighth, the issue of petitioner's ability to defend a suit in the United States (Pet.App. 15a) is entitled to no consideration in a due process analysis. For as this Court declared in *World-Wide Volkswagen Corp.* v. *Woodson*—

> [e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its laws to the controversy; [and] even if the forum State is the most convenient location for litigation . . .

such factors do not render the assertion of *in personam* jurisdiction proper. *Id.* at 294.

Ninth, the Court of Appeals' observation (Pet.App. 15a) that if American courts were to decline jurisdiction under the facts asserted here, certain unspecified "substantive policies of international law will be undermined"[28] manifestly does not furnish an affiliating link between the *petitioner* and the United States.

And tenth, the final remark by the court of appeals that "fairness" favors exercise of personal jurisdiction over the petitioner since respondents claim to have been denied a judicial remedy in Argentina under Argentine law (Pet.App. 15a) is also devoid of weight in a due process

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[28] Although these "substantive policies" had not been expressly identified, the majority's personal jurisdiction analysis begins with the observation "that certain universal offenses, like piracy and genocide are offenses against the law of nations wherever they occur . . . [and that the] allegations here probably fall within this class of offense." (Pet.App. 14a.) The majority then noted the argument advanced by some that "such occurrences always have sufficient effects' within the United States top satisfy due process." *Id.* Although the court did not base its finding of *in personam* jurisdiction on this theory, it nonetheless warrants some discussion.

The majority's observation is irrelevant to a due process analysis and its reliance on § 404 of the *Revised Restatement* (Tent. Draft No. 6, 1985)—now § 404 of the *Restatement (Third)*—is wholly misplaced. That section, entitled "Universal Jurisdiction to Define and Punish Selected Offenses," deals with "Jurisdiction to Prescribe"—the capacity of a state under international law *to make* a rule of law.

The pivotal inquiry here is whether under the circumstances of this case a state may under international law exercise jurisdiction *to adjudicate* a claim of law—to assert *in personam* jurisdiction over persons or legal entities—a subject that dealt with in § 421 of the *Restatement (Third)*. The majority patently confuses the distinct concepts of jurisdiction to prescribe and jurisdiction to adjudicate.

The concept of "universal" offenses connotes that any state may prescribe substantive rules prohibiting certain conduct and that it may enforce those rules *if* it gets hold of the alleged offender. It has noting to do with the state's authority to subject an alleged offender to the process of its courts. See § 401 of the *Restatement (Third)*.

analysis. Like the United States, the petitioner regards certain claims arising out of its public law activities subject to settlement by means other than litigation. Cf. *Chaser Shipping Corp.* v. *United States*, 649 F.Supp. 736 (S.D.N.Y. 1986), *aff'd*, April 27, 1987 (No. 87-6027, 2d Cir.; unpublished opinion), *cert.denied*, November 11, 1987 (56 U.S.L.W. 3453). (A suit for damages suffered by foreign shipowner as a result of a surreptitious mining of a Nicaraguan harbor by an agency of the United States does not present a justiciable issue.)

In sum, there is a total absence of any affiliating contacts by the petitioner with the United States which would permit the assertion of *in personam* jurisdiction as a matter of constitutional law. The majority's conclusion "that there is no constitutional bar to the district court's exercise of jurisdiction over Argentina here" (Pet.App. 15a) is violative of the Fifth Amendment's Due Process Clause and disregards this Court's consistent and long-established constitutional holdings with respect to the personal reach of nonresident defendants.

By concluding that Argentina was in this instance subject to the court's *in personam* jurisdiction in connection with a suit filed by an alien, the court of appeals not only ruled contrary to law but inconsistent with the practical interests of this nation's judicial system and foreign policy. The Court of Appeals should have heeded this Court's admonition that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Industry Co.* v. *Superior Court*, *supra*, 94 L.Ed.2d at 106, quoting *United States* v. *First National City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).[29]

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[29] Ironically, the Second Circuit itself has on past occasions expressed the same concern that "the assertion of personal jurisdiction 'must be applied with caution, particularly in an international context.'" *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, *supra*. 647 F.2d at 315 n. 37, quoting *Lesco Data Processing Equipment Corp.* v. *Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972).

B. PETITIONER IS NOT AMENABLE TO SERVICE AND THEREFORE IS NOT SUBJECT TO THE COURT'S IN PERSONAM JURISDICTION

As this Court recently reiterated in *Omni Capital Int'l* v. *Rudolf Wolff & Co.*, *supra*, there must not only exist "a constitutionally sufficient relationship between the defendant and the forum," but there must also exist "a basis for the defendant's amenability to service of summons" before a court can exercise personal jurisdiction over that defendant.[30] "[T]his means there must be authorization for service of summons on the defendant." 98 L.Ed.2d at 424. The additional question presented here, as it was in *Omni*, is "whether there [was] authorization to serve summons in this litigation." *Id.* The court of appeals held that the procedural rules of the FSIA "would simply apply to a suit under [the Alien Tort Act] as well" (Pet.App. 13a). This was plainly erroneous.

Service of process in a federal action is generally governed by Rule 4 of the F.R.Civ.P. Under paragraphs (e)-(f) of that Rule, service may be made anywhere in the forum state or anywhere else if authorized by a federal statute or the forum state's long-arm statute. In the instant case, neither the Alien Tort Statute nor the New York long-arm statute authorized service of summons on Argentina, and thus there existed no basis on which the court could exercise personal jurisdiction over the petitioner.

The fact that the Alien Tort Act does not provide a basis for petitioner's amenability to service is not only

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[30] Indeed, in *Omni* this Court stated that even if the Due Process Clause of the Fifth Amendment were not violated by the assertion of personal jurisdiction in a particular case, such assertion might still be improper if "other prerequisites to a federal court's exercise of personal jurisdiction," such as amenability to service, are not satisfied. 98 L.Ed.2d at 423.

plain from the language of the Act itself but is also implicitly conceded by respondents' exclusive reliance on the FSIA's service provisions in attempting to effectuate service on Argentina (*see*, Pet.App. 36a-42a).

The FSIA, however, is unavailable to respondents as authority for serving the petitioner in this case. The service provision of the FSIA, § 1608, was enacted by Congress for use in cases where the substantive provisions of the FSIA apply, *i.e.*, in cases where a foreign state, agency or instrumentality is subject to suit under §§ 1605-1607 of the Act and not entitled to immunity under § 1604. As the legislative history reflects, Section 1608 was viewed by the drafters as "closely interconnected with other parts of the bill" and as having an "integral role in the bill. . ." H.R. Rep.No. 94-1487, *supra*, at 23.

Whenever Congress enacts legislation that includes a special service provision—as it did in the FSIA—a litigant's permissible use of that service provision is limited *only* to those cases contemplated by the substantive provisions of the legislation. "The [service] provision cannot be carried beyond what Congress intended." *Lasch* v. *Antkies*, 161 F.Supp. 851, 852 (E.D. Pa. 1958). In seeking to use the FSIA as a service vehicle while at the same time *expressly* disclaiming the applicability of the FSIA to the merits of the action, the respondents have clearly followed a route "beyond what Congress intended."

Since the Alien Tort Act did not authorize service of summons on Argentina, "we look to the second sentence of Rule 4(e), which points to the long-arm statute of the State in which the District Court sits—here" New York, *Omni Capital Int'l* v. *Rudolf Wolff & Co., supra*, 98 L.Ed.2d at 426, to determine whether Argentina was nonetheless amenable to service and thus subject to the court's *in personam* jurisdiction. We submit that the requirements

of the New York long-arm statute[31] cannot be met in this instance; indeed, respondents have not even asserted that the court may reach Argentina in this manner.

In sum, the court of the United States may not exercise jurisdiction over Argentina without authorization to serve process. *Omni, supra*, 98 L.Ed.2d at 428. That authorization is not found either in the Alien Tort Act or the New York long-arm statute, and this fatal defect was a

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[31] The New York long-arm statute provides in relevant part:

> [A] court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent:
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> 1. transacts any business within the state; or
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> 2. commits a tortious act within the state . . .;
>
> 3. commits a tortious act without the state causing injury to person or property within the state . . . if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state or,
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.

7B McKinney's Con. Laws of New York Ann CPLR § 302 (1972).

The present action did not arise out of any business transacted by Argentina in New York, is not based on a tortious act performed by Argentina in New York, and is not based on Argentina's contacts with New York and any tortious act performed outside New York that injured respondents in that state. As noted in the Practice Commentaries to CPLR § 302, "[a]n injury does not occur in New York simply because the plaintiff is domiciled or does business there." To conclude otherwise would be absurd since it would have the effect of subjecting "all the world to jurisdiction in New York anytime a New York domiciliary was injured." *Id.*

further and independent ground why personal jurisdiction could not be asserted over the petitioner.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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